



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

June 21, 2023

Re: FOIA Request NLRB-2023-000661

Dear James Sherk (America First Policy Institute):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on January 25, 2023:

For the covered period (06/1/2020 to 9/30/2021), I request copies of all federal records created by the following individuals on non-official electronic messaging accounts that were subsequently forwarded to an official electronic messaging account during the covered period: Lauren M. McFerran; Gwynne A. Wilcox; David M. Prouty; Peter Sung Ohr; Jennifer Abruzzo; Jessica Rutter; Richard Bock; Nancy Platt; and Ken White.

You assumed financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on January 25, 2023.

Pursuant to the FOIA, reasonable searches of the named NLRB officials' Agency email accounts were conducted for the requested records for the period June 1, 2020 through September 30, 2021. These searches yielded 30 pages of responsive, releasable records, which are attached. No responsive records were located for Jennifer Abruzzo, Richard Bock, Lauren McFerran, Nancy Platt, Peter Ohr, and Ken White.

After a review of the attached 30 pages, I have determined that portions of the attached records are exempt from disclosure under Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)). Specifically, redactions have been made to protect the privacy interests of individuals named in the records pursuant to Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6).

Other responsive records, totaling 10 pages, are being withheld in their entirety pursuant to FOIA Exemptions 5 and 6 (5 U.S.C. § 552(b)(5) and (b)(6)).

The records, identified as responsive but withheld in their entirety, are internal communications containing legal analysis and recommendations regarding the processing of unfair labor practice cases. I have determined that they are exempt from disclosure under FOIA Exemption 5, 5 U.S.C. § 552 (b)(5). Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within an agency and to prevent a premature disclosure that could disrupt and harm the agency’s decision-making process. *Id.* at 150-152. The deliberative process and attorney work-product privileges are incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies in order to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, i.e., prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, i.e., “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). The protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005), by the agency opting not to make a decision, *see Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of

litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses, and strategies. *Id.*; see also *Wolfson v. United States*, 672 F.Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the withheld records meet the requirements of Exemption 5's deliberative process and attorney work-product privileges. The records contain predecisional discussions concerning the processing of ongoing unfair labor practice cases and/or discussions concerning the Board's internal deliberative processes concerning unfair labor practice cases. These records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. Some of the records reflect the analysis and opinions of Agency staff and attorneys created as part of the decision-making process regarding the processing of unfair labor practice cases, and thus would additionally be protected by the attorney work-product privilege. In short, Exemption 5 may properly be applied to all of these records to protect the Agency's internal communications by and among its staff as they engage in the debate and analysis of policies, practices, and other legal obligations and case processing matters before it. *Sears, Roebuck and Co.*, 421 U.S. at 150-52.

In addition, other responsive records, including client lists and lists of financial holdings, are being withheld in their entirety pursuant to FOIA Exemption 6. The Supreme Court has described Exemption 6 as reflecting privacy interests in avoiding "dissemination of . . . personal matters," and maintaining "the individual's control of information concerning his or her person". *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994), citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Here, the application of Exemption 6 to withhold these records submitted to the Agency's Ethics Office pertaining to assessment of recusal obligations and individual financial disclosure obligations, is consistent with these privacy interests. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982)

(the “primary purpose” of the exemption is “to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”)

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request. Given your placement as a news media requester, your request for a fee waiver is moot.

You may contact William T. Hearne, the FOIA Attorney-Advisor who processed your request, at (202) 273-0139 or by email at [william.hearne@nrlb.gov](mailto:william.hearne@nrlb.gov), as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine M. Minami, FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: (202) 741-5770  
Toll free: (877) 684-6448  
Fax: (202) 741-5769

June 21, 2023

Page 5

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt, Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachment: (30 pages)